

By: Harris

S.B. No. 256

A BILL TO BE ENTITLED

AN ACT

relating to contingent payment clauses in certain construction contracts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter D, Chapter 35, Business & Commerce Code, is amended by adding Section 35.521 to read as follows:

Sec. 35.521. AGREEMENT FOR PAYMENT OF CONSTRUCTION SUBCONTRACTOR. (a) In this section:

(1) "Contingent payment clause" means a provision in a contract for construction management or design services or for the construction of improvements to real property that provides that the contingent payor's receipt of payment from another is a condition precedent to the obligation of the contingent payor to make payment to the contingent payee for work performed or materials furnished.

(2) "Contingent payor" means a party to a contract with a contingent payment clause that conditions payment by the party on the receipt of payment from another person.

(3) "Contingent payee" means a party to a contract with a contingent payment clause whose receipt of payment is conditioned on the contingent payor's receipt of payment from another person.

(4) "Improvement" includes new construction, remodeling, or repair.

1 (b) A contingent payor or its surety may not enforce a
2 contingent payment clause to the extent that the nonpayment by the
3 contingent payor is the result of the fault of the contingent payor
4 or a contractor or subcontractor of the contingent payor other than
5 the contingent payee.

6 (c) A contingent payor or its surety may not enforce a
7 contingent payment clause as to work performed or materials
8 delivered after the fifth day after the date on which the contingent
9 payor receives written notice from the contingent payee objecting
10 to the further enforceability of the contingent payment clause as
11 provided by this section. The written notice is effective only if
12 it is sent after the 30th day after the accrual of an unpaid
13 indebtedness, other than retainage, owed to the contingent payee
14 for work performed or materials furnished under the contract
15 between the contingent payor and contingent payee.

16 (d) For purposes of Subsection (c), an unpaid indebtedness
17 to a contingent payee accrues only if a written request, in any
18 form, for payment of the unpaid indebtedness is submitted by the
19 contingent payee. The unpaid indebtedness accrues on:

20 (1) the last day of the month in which the work for
21 which payment is sought was performed or the materials for which
22 payment is sought were furnished, if the written request for
23 payment was submitted in that month; or

24 (2) the date on which the written request for payment
25 is submitted, if that date is after the end of the month in which the
26 work was performed or materials were furnished.

27 (e) On receipt of payment by the contingent payee of the

1 unpaid indebtedness giving rise to the written notice, the
2 contingent payment clause is reinstated as to work performed or
3 materials furnished after the receipt of the payment, subject to
4 the provisions of this section.

5 (f) A contingent payor or its surety may not enforce a
6 contingent payment clause if, under Section 53.026, Property Code,
7 the contingent payee is considered to be in direct contractual
8 relationship with the person from whom the contingent payor is to
9 receive payment.

10 (g) A contingent payment clause may not be used as a basis
11 for invalidation of the enforceability or perfection of a
12 mechanic's lien under Chapter 53, Property Code.

13 (h) A contingent payor or its surety may not enforce a
14 contingent payment clause if the enforcement would be
15 unconscionable. The party asserting that a contingent payment
16 clause is unconscionable has the burden of pleading and proving
17 that the clause is unconscionable. In determining whether the
18 enforcement of the clause is unconscionable, all circumstances may
19 be considered, including:

20 (1) whether the person attempting to enforce the
21 clause has made reasonable efforts to collect the amount owed to the
22 contingent payor in light of the likelihood of collection weighed
23 against the time, expense, and uncertainty of collection;

24 (2) the extent to which the contingent payor has
25 sufficient resources available to pursue collection, and whether
26 the contingent payee was requested and agreed to share in the
27 expense of collection;

1 (3) the extent to which the contingent payor has made
2 reasonable and prompt efforts to allow the contingent payee to
3 pursue meaningful collection opportunities in situations in which
4 the contingent payor is unable or unwilling to bring legal action
5 for the collection of the amount owed to the contingent payor; and

6 (4) whether the contingent payor exercised diligence
7 in ascertaining the financial viability of the person owing payment
8 to the contingent payor or the existence of adequate financial
9 arrangements to pay for the improvements, before entering into the
10 contract in which the contingent payment clause has been asserted,
11 and the extent to which the contingent payor communicated the
12 nature of that diligence and any financial risks to the contingent
13 payee.

14 (i) A contingent payor, who has not filed suit or initiated
15 other formal legal action for collection of the amount owed to the
16 contingent payor, has made reasonable efforts to collect the amount
17 owed, as required by Subsection (h)(1), if a reasonable business
18 person would consider the action futile or cost prohibitive.

19 (j) The assertion of a contingent payment clause is an
20 affirmative defense to a civil action for payment under a contract.
21 The party asserting the defense must plead and prove that the
22 contract contains a contingent payment clause that is enforceable
23 under this section.

24 (k) This section does not affect a provision that affects
25 only the timing of a payment in a contract for construction
26 management or design services or for the construction of
27 improvements to real property if the payment is to be made within a

1 time period that is reasonable.

2 (1) A person may not waive this section by contract or other
3 means. A purported waiver of this section is void.

4 SECTION 2. (a) Section 35.521, Business & Commerce Code, as
5 added by this Act, applies only to a contingent payment clause under
6 which payment is contingent on the receipt of payment under a
7 contract or other agreement entered into on or after September 1,
8 2003.

9 (b) This Act takes effect September 1, 2003.